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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,
vs.
WILLIAM A. STAENGEL,
Respondent.

No. 633

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit
and

BRIEF IN SUPPORT THEREOF.

CARLETON S. HADLEY,
WALTER N. DAVIS,
Attorneys for Petitioner.

302 Union Station,
St. Louis, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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No. .....

PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the United States Circuit Court of Appeals within and for the Eighth Circuit (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinions and judgment rendered and entered on July 30, 1941, in this cause, lately pending in said United States Circuit Court of Appeals, styled Terminal Railroad Association of St. Louis, a corporation, appellant, v. William A. Staengel, appellee, No. 11,935 of civil causes on the docket of the court below, affirming a

judgment of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, in said cause, in favor of respondent and against your petitioner herein.

OPINIONS OF THE COURT BELOW.

The opinions of the court below in said cause of Terminal Railroad Association of St. Louis, a corporation, appellant, v. William A. Staengel, appellee, which is by this petition sought to be reviewed, appear on pages 151 to 165, inclusive, of the printed transcript of the record filed herewith, but have not yet been published either in advance sheets or the bound volumes of the Federal Reporter.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, Title 28 U. S. C. A., Sec. 347, providing for review in this Court by certorari of decisions of the Circuit Court of Appeals. The judgment of the court below sought by this petition to be reviewed was entered July 30, 1941. Petitioner's petition for a rehearing of said cause by said Circuit Court of Appeals was duly filed in the court below on August 12, 1941, within fifteen days after said July 30, 1941, as provided by the rules of the court below. Thereafter, on August 30, 1941, said petition for a rehearing of said cause was denied by the court below, by order duly entered of record in said court (R. 198).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat.

65), to recover against petitioner damages sustained by him while, as a switchmen of the petitioner and in the scope of his employment, he was injured in the following manner: While riding on the rear end of the last car of a freight train he was thrown off the car when the rear trucks of the car upon which he was riding followed a different railroad track from the one over which the remainder of the train was passing (R. 14).

Respondent pleaded general negligence and relied upon res ipsa loquitur (R. 3). He proved the injury, together with the immediately surrounding circumstances, and rested (R. 8 to 14). Petitioner proved by uncontradicted and unimpeached evidence that the switch involved was not thrown by any of its employees (R. 58, 69); that it had operated perfectly before respondent's injury (R. 58, 72, 74), and tests which were made immediately afterwards disclosed nothing defective, and the switch continued to operate perfectly between the date of respondent's injury and the date of the trial without repairs or replacements of any kind (R. 58, 72, 74). The abnormal operation of the switch at the moment of respondent's injury was conceded. Petitioner's evidence in the District Court failed to show any reason for such abnormal operations, and showed further that its employees could not discover anything defective with the switching apparatus, but, on the contrary, it operated before and after respondent's injury in a perfectly normal manner (R. 58, 72, 74).

Petitioner's evidence further disclosed that the movements of the switch in question were controlled from a near-by switch tower, in which were located the levers which controlled the switching mechanism by the use of electricity and compressed air; that when a train was on that portion of the track over which respondent's train was passing when he was injured it completed an electrical circuit which locked the levers in the tower so that

they could not have been moved had such movement been desired (R. 59, 69, 75, 88). Petitioner's evidence further showed that no attempt was made to operate the particular lever controlling the movement of the switch involved at the time of respondent's injury (R. 58, 69). After respondent's injury petitioner's officers held an investigation, but could not discover the cause of the abnormal operation of this switch (R. 81, 85). Upon this evidence the cause was submitted to the jury on the res ipsa loquitur doctrine.

At the close of all the evidence a conference was held in the District Judge's chambers at which both parties submitted written requests for charges to the jury. Petitioner asked the District Judge to give its charge designated "Def. No. 9" (R. 132, 133), which in substance informed the jury that petitioner should prevail if the jury believed (1) there was no defect in the switching appliance, or (2), if there was a defect, it arose and was created by circumstances beyond petitioner's control; or (3) that such defect, if found to be present, had existed for so short a time that petitioner could not reasonably have been expected to have had knowledge of it by the use of ordinary care. The trial judge announced he would not so charge the jury (R. 125). Following argument of counsel on both sides in the District Court, the trial judge included in his charge to the jury the substance of petitioner's requested charge designated "Def. No. 9" (R. 123), which he had announced prior to the argument would not be given (R. 125). His prior announcement that he would not so charge the jury was specifically called to the Judge's attention, and specific exception was taken thereto by petitioner immediately after the charge was given to the jury and before the jury retired (R. 125, 126).

The jury allowed respondent $35,000 damages and the District Court entered judgment in his favor for that sum

(R. 7). In due course petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit, perfected its appeal and orally argued said cause on May 20, 1941. Petitioner's grounds for reversal of said cause by the court below, as presented in its written brief as well as orally, were:

(1) That under the decisions of this Court respondent had failed to make a submissible case because petitioner's exculpatory evidence was undisputed, unimpeached, not contrary to physical law, and, therefore, completely nullified whatever inference may have been created by the res ipsa loquitur doctrine, for the reason that such doctrine is at most no more than an inference of fact and can never stand in the face of uncontradicted and unimpeached testimony contrary to the inference.

(2) That the District Court violated Rule 51 of the Rules of Civil Procedure by announcing that he would not incorporate in his charge the theories requested by petitioner in "Def. No. 9," thereby preventing petitioner's counsel from arguing the defensive theories therein contained; and then, after the arguments had been completed, the trial judge erroneously included in his charge the very theories which he had stated would not be incorporated, in clear violation of such rule.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition for this writ are:

I.

Whether, in an action under the Federal Employers' Liability Act (U. S. C. A., Title 45, Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for damages for personal injuries, the res ipsa loquitur doctrine is applicable under any circumstances for the reason that the action is one between employee and employer.

II.

Conceding the applicability of res ipsa loquitur, is petitioner's uncontradicted and undisputed evidence sufficient to overcome the inference of fact created by res ipsa loquitur and to require a directed verdict for petitioner?

III.

Is a clear violation of Rule 51 of Rules of Civil Procedure reversible error?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

By its opinion herein rendered July 30, 1941, the court below holds that res ipsa loquitur is applicable in a case prosecuted under the provisions of the Federal Employers' Liability Act. The same Court had previously held in several cases that such a theory is never applicable in an action between servant and master. This Court has announced the same doctrine. Some of the other Circuit Courts of Appeals have announced the contrary doctrine.

Whether or not res ipsa loquitur shall be applied in cases of this character is of the gravest importance to plaintiffs and defendants generally. Apparently this Court has not, except by inference and analogy, passed upon this question since the enactment of the Federal Employers' Liability Act. Unquestionably there is serious disagreement among the various Circuit Courts of Appeals as to the applicability of this doctrine. Thus a condition is created whereby the result of a case of this character will be determined by the particular Circuit Court of Appeals to which it goes on appeal, rather than by a settled principle of law. In other words, the forum rather than the law determines the result of the action. This Court should unquestionably

remedy this situation. The question is one of great public importance because of the large number of persons affected thereby.

II.

The opinion of the court below holds that even though petitioner's evidence showing that it was not guilty of any negligence which caused respondent's injury is uncontradicted, unimpeached and not violative of any physical law, nevertheless, it creates a question for the jury rather than for the Court. This is directly in the face of this Court's opinions, as well as those of the court below heretofore promulgated. This Court, in the many cases in which the doctrine has been announced, as above stated, has in none of them limited the application of the rule to cases which do not involve res ipsa loquitur. Many state courts which follow the rule of this Court with respect to when a verdict may be directed apply that rule to res ipsa loquitur cases just as to all other cases. The United States Circuit Court of Appeals for the Seventh Circuit has applied this Court's rule now being discussed to a case involving res ipsa loquitur.

This Court has applied the rule with respect to inferences created by statute as well as to the inference or presumption against suicide.

This question will ultimately have to be settled by this Court to avoid contrariety of opinion among the several Circuit Courts of Appeals.

III.

Rule 51 of the Rules of Civil Procedure was created to give "the lawyer a reasonably clear notion what the charge is going to be so he will know how to argue the case." (Second lecture by Hon. William D. Mitchell, given at Brooklyn Law School on Thursday, Oct. 20, 1938.)

The question here presented is whether or not a district judge may inform counsel that a particular charge requested by him in writing will not be given to the jury and then give it to the jury after the arguments have been completed. The court below has refused to hold such action reversible error. This holding, in effect, nullifies Rule 51 of the Rules of Civil Procedure and is directly in the face of this Court's decisions that every error is presumptively harmful, especially if it involves a charge to the jury.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, directing said Court to certify to this Court, on a day certain to be therein named, a full and complete transcript of the record of the proceedings in said cause of Terminal Railroad Association of St. Louis, a corporation, appellant, v. William A. Staenger, appellee, that court's No. 11,935, of Civil Causes, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Court of Appeals in said cause, dated July 30, 1941 (the petition for rehearing denied August 30, 1941) be reversed, and that petitioner have such other relief as to this Court shall seem appropriate.

CARLETON S. HADLEY,
WALTER N. DAVIS,
Attorneys for Petitioner.